

## REMARKS

Claims 1-56 are pending in the present application. Claims 35-56 are withdrawn from consideration and have been canceled. Applicants expressly reserve the right to file divisional applications or take such other appropriate measures deemed necessary to protect the inventions in the canceled claims. Claims 6, 12, 20 and 28 are canceled in the present response. Claims 1, 7, 13-14, 22-23 and 29-34 have been amended. Support for the amendments to the above-referenced claims can be found, *inter alia*, on page 18, lines 1-10 of the specification as originally filed. Claims 57-61 have been added. No new matter has been added by way of amendment. Applicants respectfully request reconsideration of the claims in view of the following remarks.

### Detailed Action

#### *A. Election./Restriction*

The Examiner acknowledges Applicants election without traverse of Group I, claims 1-34 in the response filed on September 25, 2003.

#### *B. Priority*

Applicants further acknowledge that the claim of Foreign Priority has been perfected under 35 U.S.C. § 119(a)-(d). In addition, Applicants are submitting herewith a certified copy of the Canadian application received from the Canadian Patent Office.

Applicants have amended the specification to include the "CROSS-REFERENCE TO RELATED APPLICATION" section prior to the "FIELD OF THE INVENTION". No new matter has been added. Applicants respectfully request that the objection be withdrawn.

*C. Specification*

The Examiner has objected to the specification for the "incorporation of essential material in the specification by reference to a foreign application or patent, or to a publication, as claimed on page 1 of the specification".

Applicants have amended the application to remove the "incorporation by reference". Applicants respectfully request that the objection be withdrawn.

Claim Objections

The Examiner objects to claims 30-34. The Examiner states that the phrase "A method" should read --The method--. Applicants have now amended the claims as suggested by the Examiner, thereby obviating this objection.

The Examiner further objects to claim 23 under 37 C.F.R. § 1.75(c) as being of improper dependent form.

Applicants have amended claim 23 to read "further comprising a breeding program selected from the group". Applicants request reconsideration and withdrawal of the claim objections.

Claim Rejections Under 35 U.S.C. §101

The Examiner rejects claims 1-5 and 14-19 under 35 U.S.C. §101 as the Examiner states the claimed invention is directed to non-statutory subject matter. The Examiner states that the claims do not denote the hand of man, and thus are considered a product of nature.

Applicants respectfully traverse this rejection. The claimed invention required significant human interaction. Specific identified plants were crossed, progeny seed were planted and sprayed, microspores were collected from a slurry of the plants, the microspores were grown on media containing Pursuit™ to produce embryos, the doubled haploids were produced from the embryos using colchicine, doubled haploid lines were grown to evaluate and select for days to maturity, the lines were sprayed

with Odyssey™, the plants were infected with Blackleg, finally the plants were selected for blackleg and IMI resistance and canola quality oil. It is respectfully submitted that this constitutes human intervention.

In light of the above remarks, Applicants respectfully request reconsideration and withdrawal of the rejections under 35 U.S.C. § 101.

Claim Rejections Under 35 U.S.C. §112, Second Paragraph

The Examiner has rejected claims 29-34 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that Applicant regards as the invention.

Claim 29 stands rejected as indefinite because it is directed to a method comprising crossing a *Brassica napus* plant with a second *Brassica* plant of a different species, which would not produce a "hybrid canola seed" as claimed. The Examiner further states that claims 30-34 are also indefinite, as they do not obviate the indefiniteness of claim 29.

It is believed that amended claim 29 overcomes the Examiner's rejection.

In light of the above amendments and remarks, Applicants respectfully request reconsideration and withdrawal of the rejections under 35 U.S.C. § 112, second paragraph.

Claim Rejections Under 35 U.S.C. § 112, First Paragraph

Written Description

Claims 1-5, 7-11, 13-19, 21-27 and 29-33 stand rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The Examiner states that "Applicant does not describe the genus

of *Brassica napus* plant which is Early Napus and resistant to at least one AHAS-inhibitor herbicide”.

Applicants have amended claims 1, 7, 14, 22 and 29, to include the ATCC Accession deposit PTA-2470 of NS3801.

Accordingly, Applicants request that the rejection of claims 1-5, 7-11, 13-19, 21-27 and 29-33 under 35 U.S.C. §112, first paragraph, be withdrawn.

### *Enablement*

The Examiner has rejected claims 1-34 under 35 U.S.C. §112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention commensurate in scope with the claims.

Representative seed of variety NS3801 have been deposited under the Budapest Treaty and given ATCC Accession No. PTA-2470. All restrictions imposed by the depositor on the availability to the public of the deposited material will be irrevocably removed upon the granting of the patent. However, Applicant does not waive any infringement of its rights granted under this patent. The specification has been amended to state that the deposit has been made under conditions of the Budapest Treaty.

Applicants submit at least 2500 seeds of *Brassica napus* NS3801 has been deposited with the ATCC on September 14, 2000 and given ATCC Accession No. PTA-2470. A copy of the ATCC deposit form is enclosed.

The Examiner further rejects claims 1-5, 7-11, 13-19, 21-27 and 29-33 because the limitation “resistance to at least one AHAS-inhibitor-herbicide is not a unique feature of the claimed invention and further that the limitation Early Napus does not appear to be a predictable phenotype. The Examiner states that the art teaches the exact locations or effects of loci involved in flowering times in *Brassica napus* are unknown, and thus the effects of the combination are unpredictable

(Osborn *et al.*, 1997, Genetics 146:1123-1129). It is the Examiner's opinion that given the limited guidance by Applicant for making and using progeny of the exemplified NS3801 *Brassica napus* line, the unpredictability of how two *Brassica* plants will recombine without trial and error experimentation, and the teaching of the art as to what constitutes a useful *Brassica* line, it would have required undue trial and error experimentation by one of skill in the art at the time of the Applicant's invention.

The fact that a trait is complex does not eliminate its effectiveness in a breeding program to achieve desired traits, i.e. a complex trait can be bred and selected for. Applicants have provided assurance *supra* that at least 2500 seeds of *Brassica napus* NS3801 have been deposited with the ATCC. In view of this assurance, the rejection under 35 U.S.C. § 112, first paragraph, should be removed (MPEP § 2411.02). The present application in conjunction with the deposit, provides sufficient disclosure to produce the products of claims 1-5, 7-11, 13-19, 21-27 and 29-33, see pages 7-9 and the Examples in the present application.

In light of the above amendments and remarks, Applicants respectfully request reconsideration and withdrawal of the rejections to claims 1-5, 7-11, 13-19, 21-27 and 29-33 under 35 U.S.C. § 112, first paragraph.

#### Claim Rejections Under 35 U.S.C. §§ 102/103

Claims 1-5, 7-11, 13-19, 21-27 and 29-33 stand rejected under 35 U.S.C. § 102(e) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Patel (U.S. Patent No. 6,222,101, filed February 24, 1999).

Applicants note that the Examiner considers claims 6, 12, 20, 28 and 34 free of the prior art, which neither teaches nor fairly suggests a *Brassica napus* variety NS3801. The present claimed invention, claims plants, plant parts, plant cells and methods of breeding and regenerating *Brassica* variety NS3801.

In light of the above, Applicants respectfully request the Examiner withdraw the rejection under 35 U.S.C. § 102(e) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Patel (U.S. Patent No. 6,222,101, filed February 24, 1999).

#### Double Patenting

The Examiner has provisionally rejected claims 1-5, 7-11, 13-19, 21-27 and 29-33 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 2, 7 and 12 of copending Application No. 09/993,751.

Claims 1, 2, 7 and 12 in U.S. Application No. 09/993,751 are to a plant designated NS3213, representative seed having been deposited under ATCC Accession No. PTA-2471. The present claimed invention, claiming plants, plant parts, plant cells and methods of breeding and regenerating Brassica variety NS3801, representative seed of said variety having been deposited under ATCC Accession No. PTA-2470, is not the same invention as the cited reference.

Applicants respectfully request reconsideration and withdrawal of the current double patenting rejections.

#### Summary

Applicants acknowledge that the Examiner considers claims 6, 12, 20, 28 and 34 are free of the prior art, which neither teaches nor fairly suggests a *Brassica napus* variety NS3801.

Application. No. 09/994,092  
Amendment Dated 06/18/2004  
Reply to Office Action of 12/19/2003

### CONCLUSION

In conclusion, Applicants submit in light of the above amendments and remarks, the claims as amended are in a condition for allowance, and reconsideration is respectfully requested. If it is felt that it would aid in prosecution, the Examiner is invited to contact the undersigned at the number indicated to discuss any outstanding issues.

Respectfully submitted,



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